

H. B. asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge George's denial of Mr. B.'s claim for benefits under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

On or about July 8, 2000, while finishing drywall at a construction project, Howard B. fell and injured his right hip, thigh, leg and wrist. On February 7, 2001, Mr. B. filed an application with the Labor Commission alleging he was employed by Reed Jessee Construction ("Jessee" hereafter) at the time of his accident and was therefore entitled to workers' compensation benefits for his injuries.¹

After an evidentiary hearing that ended on May 20, 2003, Judge George issued his decision on March 29, 2004. In that decision, Judge George concluded that Mr. B. was not Jessee's employee at the time of his accident and, therefore, was not entitled to workers' compensation benefits.

Mr. B. now asks the Appeals Board to review Judge George's decision.

DISCUSSION

Section 34A-2-401 of the Utah Workers' Compensation Act provides that "(a)n employee described in Section 34A-2-104" who is injured in a work-related accident is entitled to workers' compensation benefits. As relevant to Mr. B.'s claim, §34A-2-104(1)(b) defines "employee" as "each person in the service of any employer, as defined in Section 34A-2-103, who employs one or more workers or operatives regularly in the same business, or in or about the same establishment: (i) under any contract" Finally, §34A-2-103(2) defines "employer" as "... each person . . . who regularly employs one or more workers or operatives in the same business, or in or about the same establishment, under any contract of hire"

In Bennett v. Industrial Commission, 726 P.2d 427, 429 (Utah 1986), the Utah Supreme Court interpreted the foregoing provisions of the Utah Workers' Compensation Act as follows:

. . . [I]t will almost always follow that **if the evidence shows that an "employer" retains the right to control the work of the claimant, the claimant is the employer's employee for workmen's compensation purposes.** Certainly, the concept of right to control is not to be rigidly and narrowly defined. Rather, it should be defined to give full effect to the remedial purposes of the Workmen's Compensation Act. (Citations omitted; emphasis added.)

Thus, the degree to which Jessee retained the right to control Mr. B. in the performance of

his work is of central importance in determining whether Mr. B. was Jessee's employee. Unfortunately, Judge George's decision is inadequate because it does not make any significant findings with respect to this essential question of control. The Appeals Board therefore remands Mr. B.'s claim to Judge George to review the evidence, make findings with respect to the degree of control exercised by Jessee over Mr. B., and then determine whether such elements of control support a conclusion that an employer/employee relationship existed at the time of Mr. B.'s accident.

The Appeals Board also notes in Judge George's decision an apparent misunderstanding of the scope of §34A-2-103(7)(e) of the Act. At page eleven, Judge George states that "(t)he threshold question is whether (Mr. B.'s) signing of a Utah Statutory Employee Exclusion precludes a workers compensation claim." It appears that Judge George believes that **any** employee can waive workers' compensation benefits by executing the so-called statutory employee exclusion authorized by §34A-2-103(7)(e). In fact, the exclusion is **only** available for individuals who are sole proprietors or partners in a partnership, but would be treated as employees of another entity by virtue of the "statutory employee" provisions contained in §34A-2-103(7)(a). Consequently, if Mr. B. is determined to be one of Jessee's regular employees, he may not waive his right to workers' compensation benefits, regardless of the provisions of §34A-2-103(7)(e).

ORDER

The Appeals Board grants Mr. B.'s motion for review, sets aside Judge George's prior decision and remands this matter to Judge George for further proceedings consistent with this decision.

In light of the delay Mr. B. has already experienced in obtaining resolution to his claim, Judge George is urged to give his prompt attention to this matter.

It is so ordered.

Dated this 31st day of January, 2005.

Colleen S. Colton, Chair
Patricia S. Drawe
Joseph E. Hatch

1. Liberty Mutual, as Jessee's workers' compensation carrier, was included as a respondent to Mr. B.'s claim. Later, Team America, Jessee's employee leasing company, and Hartford Insurance and Specialty Risk Services, Team America's workers' compensation insurance carriers, were added as respondents. St. Paul Fire and Marine, another insurance carrier, was also added as a respondent but later dismissed from the case.